



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**MEMORANDUM**

**TO:** THE COMMISSION  
STAFF DIRECTOR  
GENERAL COUNSEL  
FEC PRESS OFFICE  
FEC PUBLIC DISCLOSURE

**FROM:** OFFICE OF THE COMMISSION SECRETARY *Mudd*

**DATE:** October 12, 2006

**SUBJECT:** COMMENTS ON DRAFT AO 2006-31  
(Proposed amended version of Draft A)

Transmitted herewith are timely submitted comments from Messrs. Mark J. Prak, Marcus W. Trathen, and Charles F. Marshall regarding the above-captioned matter.

The proposed draft advisory opinion is being considered under an expedited process.

Attachment

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October 12, 2006

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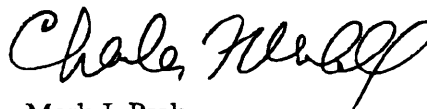
Re: Comments in Response to AOR 2006-31

Dear Mr. Norton:

We are enclosing a proposed amended version of the Office of General Counsel's Draft A of Advisory Opinion 2006-31 circulated by the Commission on October 11, 2006, in response to Advisory Opinion Request 2006-31 filed by the Bob Casey for Pennsylvania Committee.

The attached changes will serve as the comments of the undersigned.

Respectfully Submitted,


Mark J. Prak  
Marcus W. Trathen  
Charles F. Marshall

Enclosure

## ADVISORY OPINION 2006-31

Marc E. Elias, Esq.  
Ezra W. Reese, Esq.  
Perkins Coie LLP  
607 Fourteenth Street, N.W.  
Washington, D.C. 20005

**DRAFT A**

Dear Mr. Elias and Mr. Reese:

We are responding to your advisory opinion request on behalf of the Bob Casey for Pennsylvania Committee (the "Casey Committee") regarding whether, under the Federal Election Campaign Act of 1971, as amended (the "Act"), a television station would make a prohibited corporate in-kind contribution to the Casey Committee by selling advertising time at the Lowest Unit Charge ("LUC")<sup>1</sup> if Mr. Casey is not "entitled" to the LUC under section 315 of the Communications Act of 1934, as amended. *See* 47 U.S.C. 315(b).

The Commission concludes that its statutory jurisdiction does not extend to the Communications Act, but as long as the television station offers the LUC, or a rate equivalent to the LUC,<sup>1</sup> to all<sup>2</sup> Federal candidates consistent with the requirements of the Federal Communications Commission ("FCC")<sup>3</sup>, the LUC would be a discount offered in the ordinary course of business and therefore would not be an in-kind contribution to the Casey Committee and thus not a violation of the Federal Election Campaign Act, regardless of whether Mr. Casey is "entitled" to the LUC under the Communications Act.

<sup>1</sup> The LUC is the lowest advertising rate that a station charges other advertisers for the same class and amount of time for the same period. *See* 47 U.S.C. 315(b)(1) and 47 CFR 73.1942(a)(1). □

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***Background***

The facts presented in this advisory opinion are based on your letter of September 19, 2006, as supplemented by your emails of September 20, 2006.

The Casey Committee is the authorized committee of Bob Casey, a candidate for election to the United States Senate from the Commonwealth of Pennsylvania. Mr. Casey's opponent in the general election is Senator Rick Santorum.

On September 12, 2006, Senator Santorum and his campaign committee, Santorum 2006 (the "Santorum Committee"), ran a television advertisement that contained several direct references to Mr. Casey. According to the storyboard that you provided of the Santorum Committee's advertisement, an image of Senator Santorum appears only in the first frame of the advertisement. A written statement that Senator Santorum approves the message appears at the end of the advertisement, but this statement is not accompanied simultaneously by an image of Senator Santorum.

You assert that the Santorum Committee's advertisement does not satisfy the requirements of section 315 of the Communications Act. The Communications Act generally requires broadcasters to provide candidates the LUC for a candidate's political advertisements in the 45 days preceding a primary election and the 60 days preceding a general election. However, the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (March 27, 2002) ("BCRA"), amended section 315 of the Communications Act of 1934, 47 U.S.C. 315(b), to provide that a Federal candidate "shall not be entitled" to the LUC if any of the candidate's advertisements makes a direct reference to the candidate's opponent and fails to contain a statement both identifying the

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candidate and stating that the candidate has approved the communication (the "Communications Act Statement"). In the case of television advertisements, for a period of no less than four seconds at the end of the ad, there must appear simultaneously "(i) a clearly identifiable photographic or similar image of the candidate; and (ii) a clearly readable printed statement, identifying the candidate and stating that the candidate has approved the broadcast and that the candidate's authorized committee paid for the broadcast." BCRA sec. 305, 116 Stat. at 101.

On September 15, the Santorum Committee received a letter from KDKA Television, a corporation, stating that KDKA was prepared to offer Senator Santorum the LUC for the remainder of the election campaign, despite "certain inconsistencies between the form of the disclaimers made in a spot for the Santorum campaign ... and the requirements of the Bipartisan Campaign Reform Act."<sup>2</sup> Subsequently, KDKA informed the Casey Committee that KDKA would also make the LUC available for advertisements run by Mr. Casey, regardless of whether the advertisements contain the proper Communications Act Statement.

On September 20, KDKA amended its Political Disclosure Statement, which sets forth the station's policies regarding the sale of time to candidates for public office, to provide as follows: "It is not presently clear whether a station may, as a matter of its own discretion, continue to afford the lowest unit charge to a candidate who has caused the broadcast of an ad that does not comply with the above disclaimer requirements [*i.e.*, does not contain the proper Communications Act Statement]. Pending further guidance from the Federal Election Commission or the Federal Communications Commission, the

<sup>2</sup> A copy of this letter is attached to your request. □

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Station will continue to afford the lowest unit rate to candidates in these circumstances.”

Several other incorporated television stations that have run Senator Santorum’s advertisements have similarly assured the Casey Committee, albeit orally rather than in writing, that they would make the LUC available to Mr. Casey, regardless of whether the Casey Committee’s advertisements include the proper Communications Act Statement.

The Casey Committee would like to accept the offers it has received from KDKA and other television stations to provide airtime at the LUC, regardless of whether the Casey Committee’s advertisements include the proper Communications Act Statement. Accordingly, the Casey Committee is developing several broadcast television advertisements that would directly refer to Senator Santorum and that would be accompanied by a variety of different statements. Among the options the Casey Committee is working with are (1) an advertisement containing a written statement at the end of the advertisement but without a simultaneous clearly identifiable image of Mr. Casey, whose image would appear at the beginning of the advertisement in conjunction with an aural statement, similar to the Santorum Committee’s advertisement discussed above, and (2) an advertisement containing all of the statements required under Commission regulations, but all aired entirely at the beginning of the advertisement. You assert that all of the options you are considering would satisfy the requirements of the

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Federal Election Campaign Act, *see* 2 U.S.C. 441d(d)(1)(b),<sup>3</sup> but none of them would contain the proper Communications Act Statement.

The ~~Federal Communications Commission ("FCC")~~<sup>5</sup> **FCC**<sup>6</sup> has jurisdiction over the Communications Act, but has not yet promulgated regulations implementing the BCRA amendments to the Communications Act. Informal conversations between Commission staff members and FCC staff members confirm, however, that the FCC staff interprets the BCRA amendments to the Communications Act to allow a television station to offer the LUC to a candidate whose advertisements do not contain the proper Communications Act Statement, as long as the station treats all Federal candidates in a consistent, non-discriminatory manner. You have informed us that FCC staff members have further confirmed this interpretation in informal conversations with KDKA and other television stations. The FCC has not made a formal determination as to whether any of the advertisements run by the Santorum Committee or any of the advertisements that you propose would or would not contain the proper Communications Act Statement.

### ***Question Presented***

*Would the Casey Committee receive a prohibited in-kind contribution if an incorporated television station charged Mr. Casey the LUC for advertising time when Mr. Casey is not "entitled" to the LUC under the Communications Act?*

<sup>3</sup> The Commission notes that, as described, the second category of advertisements that you contemplate would not be permissible under the Act and Commission regulations. 2 U.S.C. 441d(d)(1)(b) requires candidates sponsoring television advertisements to identify themselves and state that they approved the communication. The statement must be conveyed by either (1) an unobscured, full-screen view of the candidate, or (2) a voice-over by the candidate, accompanied by a clearly identifiable photographic or similar image of the candidate. The statement must also appear in writing *at the end of the communication* in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least four seconds. *See also* 11 CFR 110.11(c)(3). □

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***Legal Analysis and Conclusions***

No, the Casey Committee would not receive a prohibited in-kind contribution if an incorporated television station charged Mr. Casey the LUC for advertising time. As long as the television station customarily<sup>7</sup> offers the LUC to all<sup>8</sup> Federal candidates, the LUC would be a discount offered in the ordinary course of business.

To begin with, the Commission notes that it does not have jurisdiction over the Communications Act or over whether a candidate's advertisement meets or does not meet its requirements. The Commission has jurisdiction only over whether a candidate complies with the Federal Election Campaign Act. Because the Commission does not have the authority to determine whether a candidate's advertisement meets the requirements of the Communications Act, the Commission cannot determine if any given advertisement is or is not "entitled" to the LUC. However, for the purposes of this advisory opinion, the Commission assumes that the advertisements in question would not meet the requirements of the Communications Act and thus would not be guaranteed or "entitled" to the LUC, based on your assertion that "none [of the advertisements] will meet the additional requirements of 47 U.S.C. 315(b)(2)(C)."<sup>4</sup> The Commission makes no assumption, however, whether a broadcast station may or may not, consistent with its requirements under the Communications Act, extend the LUC to a Federal candidate who is not "entitled" to the LUC because of a violation of the disclosure

<sup>4</sup> The situation presented here differs materially from that presented in Advisory Opinion 2004-43 (Missouri Broadcasters Association), in which the Commission concluded that a broadcaster's decision to offer a Federal candidate the LUC did not result in an in-kind contribution when there was no evidence of a violation of the disclaimer requirements. In the present situation, the Casey Committee has stipulated that its advertisements will, in fact, not contain the proper Communications Act Statement, and the Commission has no basis for second-guessing that stipulation. □



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requirements of Section 315(b)(2)(C), as this is a matter falling within the jurisdiction of the FCC.<sup>9</sup>

Under the Act, a corporation makes a prohibited in-kind contribution to a political committee when it gives that committee a discount outside of the corporation's ordinary course of business. The Act prohibits corporations from making any contributions or expenditures in connection with a Federal election. *See* 2 U.S.C. 441b(a). The Act and Commission regulations define the terms "contribution" and "expenditure" to include any gift of money or anything of value for the purpose of influencing a Federal election. *See* 2 U.S.C. 431(8)(A)(i) and 431(9)(A)(i); 11 CFR 100.52(a) and 100.111(a); *see also* 2 U.S.C. 441b(b)(2) and 11 CFR 114.1(a)(1) (providing a similar definition for "contribution and expenditure" with respect to corporate activity). Commission regulations further define "anything of value" to include all in-kind contributions and state that, unless specifically exempted under 11 CFR 100.71(a), the provision of any goods or services (including advertising services) without charge, or at a charge that is less than the usual and normal charge for such goods or services, is a contribution. *See* 11 CFR 100.52(d)(1); *see also* 11 CFR 100.111(e)(1).

If a broadcaster provides the LUC to a Federal candidate who is not legally entitled to receive it, the broadcaster's sale price would constitute a discount. The Commission has held, however, that discounts that are less than the usual and normal charge are not contributions if such discounts are offered in the ordinary course of business. *See, e.g.*, Advisory Opinions 2004-18 (Friends of Joe Lieberman), 1996-2 (CompuServe), and 1989-14 (Anthony's Pier 4 Restaurant). Given that the LUC is a

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statutorily mandated discount available to all candidates whose advertisements satisfy section 315 of the Communications Act, it is a discount offered in the ordinary course of business to those candidates. Additionally, because the LUC itself is based on the rates available to certain commercial advertisers, it is by definition offered to other customers in the ordinary course of business. Accordingly, the Commission concludes that the provision of the LUC to the Casey Committee would not result in a prohibited in-kind contribution, regardless of whether the Casey Committee's advertisements would comply with section 315 of the Communications Act, so long as the television station provides the LUC to all Federal candidates, including candidates who do not comply with section 315<sup>10</sup> in conformance with applicable requirements<sup>11</sup> of the Communications Act, thereby ensuring that the television station does not favor any particular candidate<sup>12</sup>, the interpretation and enforcement of which are entrusted to the jurisdiction of the FCC and not this Commission<sup>13, 5</sup>

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your

<sup>5</sup> The situation presented here differs materially from those in previous advisory opinions, in which the Commission determined that a corporate discount would be provided to a political committee "in the ordinary course of business" only if the corporation offered the same discount on the same terms and conditions to customers other than political committees. *See, e.g.*, Advisory Opinions 2004-18 (Friends of Joe Lieberman), 1996-2 (CompuServe), and 1989-14 (Anthony's Pier 4 Restaurant). In those advisory opinions, there was no statutory provision comparable to Section 315 of the Communications Act, requiring corporations to make services available to Federal candidates at a special discounted rate, as there is here. The Communications Act requires broadcasters to offer their LUC to Federal candidates regardless of the quantity of advertising time they purchase. By creating a special discount to which only Federal candidates are eligible, the Communications Act establishes Federal candidates as a separate class of customers. Accordingly, in determining whether provision of the LUC is in the ordinary course of business, the Commission needs to consider only whether the LUC is given on the same terms and conditions to all<sup>14</sup> Federal candidates under the Communications Act (the interpretation and enforcement of which is a matter entrusted to the jurisdiction of the FCC)<sup>15</sup>, and not whether it is also offered on the same terms and conditions to other customers. □

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request. *See* 2 U.S.C. 437f. The Commission emphasizes that if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,  
Michael E. Toner  
Chairman

Enclosures (AOs 2004-43, 2004-18, 1996-2, and 1989-14)